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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALFONSO MALDONADO, Defendant and Appellant.	D052501 (Super. Ct. No. SCN217999)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

A jury convicted Jesus Maldonado (Jesus)[1] of two counts of stalking (Pen. Code,[2] § 646.9, subd. (a); counts 1 & 2), vandalism over $400 (§ 594, subd. (a)(b)(1); count 3), simple assault (§ 240; count 5), four counts of obstructing a police officer by filing a false

1 We will refer to Jesus Maldonado and his wife Krystal Maldonado by their first names to avoid confusion.

2 Statutory references are to the Penal Code unless otherwise specified.

report (§ 148.5, subd. (a); counts 6-9), and one count of resisting an officer (§ 148, subd. (a)(1), count 10).[3] The trial court sentenced Jesus to prison for two years on count 1. The court stayed sentences for counts 2 and 3 under section 654. For counts 5 through 10, the court denied probation and sentenced Jesus to 180 days with credit for time served.

Jesus's sole contention on appeal is that the trial court erred in failing to give a unanimity of acts instruction to the jury on count 3, vandalism over $400, and this error was prejudicial. We conclude any possible error was harmless, and thus, affirm the judgment.

FACTS

During the summer of 2006, the Torres, Groom, and Maldonado families all lived on Via Camellia in San Marcos. George Torres and his family owned the home in the middle in the cul-de-sac. On one side of the Torres's home lived the Groom family; the Maldonado family rented the home on the other. All three homes had backyards that abutted a private park.

Beginning in June or July of 2006, this neighborhood became the target of rocks and eggs. Although the attacks occurred sporadically at the beginning of the summer, by August rocks were flying towards the Torres and Groom homes every weekend. In the

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[3] The jury deadlocked on count 4, an additional charge of vandalism over $400 (§ 594, subd. (a)(b)(1)) with Paul Groom as the victim. On its own motion, the People dismissed count 4 after the trial court declared a mistrial for that count.

first two weeks of September, the attacks began occurring every night, even multiple times per night. On at least one night, the attacks included paintballs.

The residents of Via Camellia took various measures to protect their property and to catch the perpetrators. Both the Torres and Groom families boarded up their windows. Both families also began parking their cars down the street to avoid damage to them. The residents would patrol the private park at night attempting to see who was throwing the rocks. After a discussion that the perpetrators might be throwing rocks from an entry to the park on the side of the Maldonado house, Jesus and his brother cut down the bushes on the pathway to increase visibility. Eventually, Paul Groom took his family to live in a motor home at the beach for safety. Jesus and Torres often spoke during August and September about where the person or persons responsible could be hiding and how to apprehend them.

Despite Jesus's conversations with Torres, and assistance on a few occasions with the patrols, neighbors noticed the Maldonados acted differently than the other residents. The Maldonados never boarded up their windows, left their vehicles parked in their driveway, and were out in their backyard at night while the Torres and Groom families bunkered down at night. Jesus also discussed purchasing Groom's house during the time of the attacks, a move that Groom thought was strange given the circumstances. Groom said that during the attacks he was so frustrated with the situation that he would have given the house away.

All three families called San Diego County Sheriff's Department many times throughout early September. The Maldonados reported damage to their home, including

paintballs hitting their home and a broken glass patio table. Krystal, Jesus's wife, kept a journal of the attacks on the advice of a sheriff's deputy. Krystal and Jesus's brother Carlos reported being hit by rocks in the arm and the torso in early September. A brick struck the Torres's Volvo, putting a hole straight through to the trunk. One night, a large rock zoomed by Torres's head, barely missing him, and hit Groom's house. Both Torres and Groom reported damage to their homes through broken windows or holes in the stucco walls, as well as damage to their vehicles.

Eventually, sheriff's deputies responded by conducting six surveillance operations, including use of the SWAT team and a helicopter. From the location of the damage, the rocks and other projectiles appeared to originate somewhere in the vicinity of the Maldonados's backyard, near the park. Damage to the Torres and Groom residences was limited to the side facing the Maldonado residence. As a result, surveillance efforts by both the sheriff's deputies and neighbors concentrated on the park behind the homes.

By September 17, 2006, sheriff's deputies had narrowed down surveillance to just the Via Camellia part of the park. On that night, with only three deputies on duty to conduct surveillance, each deputy decided to watch one house on the cul-de-sac from within the park. Around 10 p.m., Deputy Horst began watching the Maldonado house aided by night vision goggles. Horst saw Jesus and Krystal in their backyard around 11 p.m., and after about 30 minutes they both headed back inside. As Krystal entered the house, Horst saw Jesus reach down and pick up an object from the ground, then throw the object toward Torres's house. A few seconds later, Horst heard the sound of an object hitting Torres's roof.

Sheriff's deputies arrested Jesus and Krystal. Deputies, including Horst, conducted a search of their house, based on Krystal's consent. Deputies found a paintball gun and paintballs with similar color to those fired at the Torres and Maldonado houses. Deputies also found rocks, similar to those thrown during the attacks, in a bucket.

At the Sheriff's station, Jesus waived his rights and spoke with deputies about the attacks. A tape of the interview was played for the jury. In the interview, Jesus admitted throwing a rock at Torres's house that night and firing paintballs at the Torres's residence on another occasion. At one point, Jesus said that he targeted Torres because he had disrespected him by telling Jesus his wife had a "nice rack." Jesus testified at trial and asserted that he had been coached into making these admissions. He said that Detective Dees, one of the men who conducted the interview, had spoken to him alone in his cell and told him he would confess to the crimes. Dees implied that he could have a friend at child protective services take his children away if Jesus did not comply. He told Jesus that he should deny any involvement, and then, Dees would give Jesus a signal when it was time to confess.

Upon Jesus and Krystal's arrests, attacks on Via Camellia stopped until October, when Jesus had been released from custody. One night, Torres's wife's car, the Groom residence, and the Torres residence were all hit by paintballs. Groom's truck was hit with rocks, shattering his rear window and damaging his tailgate. Jesus arrived home around 40 minutes later and appeared to be checking for damage. Jesus and Groom began yelling at each other. Groom testified that Jesus told him, "what comes around goes around" and "you got what was coming to you." According to Groom, Jesus also said, "I

know people that know you, and trust me, you got what was coming to you." Deputies arrested Jesus after the incident and again the attacks stopped.

At trial, Krystal testified that on multiple occasions when the Torres family reported being attacked she and Jesus were together. On a few occasions, Jesus and Krystal were away from their home when Torres called to tell them there had been an attack.

Torres estimated $1,000 in damage to his car, $365 in damage to his truck, and $650 in damage to the sides of his house as the result of all the attacks.

DISCUSSION

Jesus asserts that the trial court prejudicially erred by not giving a jury instruction on unanimity (CALCRIM No. 3500)[4] for count 3. He asserts that because the evidence showed that the various acts occurred over a period of two weeks, but the People charged only one count of vandalism of Torres's property, the court had a sua sponte duty to instruct the jury that it must unanimously agree on at least one specific act to support the vandalism charge. The People concede the acts occurred over an extended period of time, there was testimony constituting multiple acts, and no instruction on unanimity was given. However, the People argue the "continuous conduct" exception applies to the requirement a court give a unanimity instruction. In the alternative, the People assert any

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4 CALCRIM No. 3500 states, in part: "The People have presented evidence of more than one act to prove that the defendant committed [the charged offense]. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

error was harmless. We conclude that, even assuming the failure to instruct was error, the error was harmless.

In a criminal case, the jury must unanimously agree the defendant is guilty of a specific crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Diedrich* (1982) 31 Cal.3d 263, 281 (*Diedrich*).) A unanimous verdict, in criminal cases, aims to " 'eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Russo, supra,* 25 Cal.4th at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) Thus, a trial court has a sua sponte duty to give the jury a unanimity instruction where a single crime could be based upon one of several possible acts. (*Diedrich, supra,* 31 Cal.3d at pp. 280-282; see also *People v. Madden* (1981) 116 Cal.App.3d 212, 215-217 [explaining the decisional history regarding the need for a unanimity instruction].) When there are multiple acts presented to the jury which could constitute the charged offense, and the prosecution has not elected one act, "a defendant is entitled to an instruction on unanimity." (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 301.) "[T]he failure to give a jury unanimity instruction (now CALCRIM No. 3500) is the most common kind of instructional error in criminal cases." (*People v. Norman* (2007) 157 Cal.App.4th 460, 467 [the court went on to advise trial judges to make CALCRIM No. 3500 a standard instruction unless there is a reason not to give it].)

Case law, however, has established an exception to this general requirement in certain factual situations. These situations are referred to collectively as the "continuous conduct" rule. (*Diedrich, supra,* 31 Cal.3d at pp. 281-282.) "[N]o unanimity instruction

is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' " (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275, quoting *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) In some circumstances, the nature of the offense implies a continuous course of conduct, and thus, the alleged acts would fall under the continuous conduct rule. (*Diedrich, supra,* 31 Cal.3d at p. 282 [citing examples of pandering, child abuse, bribery, and contributing to delinquency].)[5]

The People's main argument rebutting Jesus's assertion of instructional error centers on the application of this continuous use exception. Jesus responds by arguing that the charged vandalism between September 1 and September 17 involved a series of separate acts. Specifically, Jesus argues that the continuous conduct rule requires acts that take place within a few minutes or hours, not multiple days. Further, Jesus argues that the use of different projectiles and different targets makes the acts distinct events requiring a jury to agree on one such act to support the conviction. Our review of the record indicates that as to the vandalism count, the case was charged, presented, argued,

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5 To this nonexhaustive list we add stalking (as charged in this case), which by its own elements involves harassment, defined for the jury as "engaging in [an] annoying and willful course of conduct directed at a specific person that seriously annoys, alarms, torments or terrorizes . . . . A course of conduct means two or more acts occurring over a period of time, however short, demonstrating a continuous purpose." (CALCRIM No. 1301.)

and defended as a course of conduct. However, even assuming the trial court erred in not sua sponte instructing the jury with CALCRIM No. 3500, the error was harmless.

Although some courts have recognized a split of authority on the standard of prejudice in failing to give a unanimity instruction (see *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545), this court applies the standard under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).[6] Based on the *Chapman* standard, "[w]here the record proves no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853, citing *People v. Deletto* (1983) 147 Cal.App.3d 458, 473.) If the record shows the jury resolved a basic credibility dispute against the defendant, thus convicting him of any of the various acts shown by the evidence, the failure to give the unanimity instruction is harmless. (*People v. Jones* (1990) 51 Cal.3d 294, 307.)

Viewing the record with this standard in mind, we are satisfied Jesus was not prejudiced even if the trial court erred by failing to instruct the jury with CALCRIM No. 3500. Count 3, vandalism over $400, involved the same conduct that was punished in count 1, stalking. The trial court correctly stayed sentencing as to count 3 under section 654, based on this relationship between the charged offenses. The jury clearly found,

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6 Because the error at issue here fails even the more stringent *Chapman* test, it would also fail the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Napoles* (2002) 104 Cal.App.4th 108, 120, fn. 8.)

beyond a reasonable doubt, that Jesus committed stalking through his continuing conduct occurring between September 1 and September 17. Jesus does not challenge the instructions as to count 1, and because the vandalism conviction is predicated on the jury finding Jesus guilty beyond a reasonable doubt for the same conduct, we cannot say the error was prejudicial. Further, this case contained a single defense by Jesus: that he did not throw any rocks or fire the paintball gun at the Torres residence. Jesus did not offer legally distinct defenses to each rock or each night, but instead asserted that he did not throw anything. It appears the jury resolved the credibility dispute against Jesus and convicted him of both stalking and vandalism. Indeed, Jesus's defense required the jury to convict him of all the acts if he committed any, and the jury's verdict on the stalking count requires such a finding. Accordingly, we conclude that any error by the trial court for failing to instruct the jury sua sponte with CALCRIM No. 3500 was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.